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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 972.

PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY,
Petitioner,

—against—

JAVOTTE SUTTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE COURT PRESS, N. Y. C.

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Statement.

The Circuit Court of Appeals, Second Circuit, in a unanimous decision by A. N. Hand, Chase and Clark, Circuit Judges, affirmed a judgment recovered by Javotte Sutton, the respondent, hereinafter called the plaintiff, against Public Service Interstate Transportation Company, the petitioner, hereinafter called the defendant, in an action to recover damages for personal injuries sustained by the plaintiff as a result of being struck by the defendant's bus after a trial before Galston, *D. J.* and a jury in the Southern District of New York.

Respondent's Contention.

We oppose this application because the instruction to the jury by the District Court was in accordance with local law and the affirmance is not in conflict with the decisions of the Circuit Court of Appeals for the Third Circuit.

Facts.

Upon the trial the principal issue tendered by the defendant was that the plaintiff was guilty of contributory negligence in standing on the platform or curbing. It asserted that plaintiff's duty did not call for her presence on the platform or ledge at booth 4. The plaintiff met that issue by showing that it was part of her duty to turn in the proceeds at the end of each day; that to facilitate accounting, currency was sorted in different denominations, and that it was the practice of collectors to go to other booths to get change (R. 22, 24, 103, 116, 118). The defendant also urged that collectors should work only from inside the booths. The plaintiff showed that collectors assigned to such booths, as well as other collectors, or other officers, of the Port Authority, stood on the platform and collected or assisted in collecting tolls (R. 62-64, 98-100, 102, 113-114, 189, 197-198). It was also proven that the driver of the defendant's bus for three years prior to this occurrence averaged five or six trips a day over this bridge and that he was familiar with the toll booths and curbing or platform outside the booths. He testified that on at least one or two or three of his daily trips, he would find someone standing on the curbing outside the booth in the same manner that the plaintiff was standing when he

pulled into lane 4. Ofttimes he saw a sergeant or another toll collector standing on this curbing and he handed the toll to such person. On those occasions, he observed that other toll collectors or officers hand the toll to the toll collector assigned to such lane and he would leave only if they were in a safe position (R. 210, 211). Collectors wear a uniform similar to that of a police officer (R. 22).

Argument.

POINT I.

The instruction to the jury was in accordance with local law.

Since petitioner's Points I, III and IV relate to the District Court's instruction, we shall endeavor to answer such argument under our Point I and show that the instruction to the jury was proper and in accordance with local law.

We contend that the defendant has taken a portion of the instruction from its context and construes such portion without reference to the whole charge.

In Reid's Branson Instruction to Juries, Third Edition, Vol. 1, Chapter 6 entitled "Interpretation and Effect" it is stated:

Sec. 135.

> "An instruction should be considered with reference to the issues, and the evidence pertinent to such issues, as well as all the other instructions. * * *"

Sec. 136.

> "The charge should be construed in its entirety. A part of an instruction may not be taken from its context nor may a single instruction be separated from other instructions given, but they must be construed with reference to the entire charge. The charge is construed in its entirety and not by fragments and isolated phrases and expressions, and where, so considered as a whole, the law is correctly applied to the facts, technical errors and minor inaccuracies should be disregarded where they have no tendency to influence or mislead the jury."

Let us review the charge as a whole. The Trial Court reviewed the issues of the case and told the jury that the plaintiff ascribed her injuries to the negligence of the defendant; that she alleged that such injuries were caused by the negligence of the driver and that his negligence was the proximate cause of her injuries; that the defendant denied that it was in any way negligent and asserted that it was the plaintiff herself by her negligence and by her contributory negligence, which brought about this accident; that the burden was on the plaintiff to prove that the allegations of the complaint are true and that she must do by a fair preponderance of the credible evidence; and that the matter of contributory negligence was one of defense because the occurrence happened in the State of New Jersey and such defense must be proved by the defendant by a fair preponderance of the credible evidence (R. 249). Then, in concise, simple language, the Trial Court reviewed the evidence with respect to liability presented by both parties. Then the Court asked the jury who was at fault? Did the plaintiff sustain her burden

of proof? Did the defendant sustain its burden of proof in respect of contributory negligence? (R. 249, 250).

The Trial Court further charged that there was testimony that not infrequently toll collectors stood on this curbing and indeed, the driver of the bus so admitted. The Court instructed the jury that if she needlessly placed herself in a dangerous position that is to be taken into consideration, but if that dangerous position in what the defendant says she placed herself was known to the driver and he nevertheless sensing the danger proceeded, ignoring the hazardous position in which she was placed, then it was for the jury to determine whether the driver acted as a reasonable and prudent driver of that vehicle under all the circumstances prevailing even as described by the driver himself. If the jury find that he could have avoided the accident, even though she contributed in part to it—the Court does not say she did—then under such assumption they should find for the plaintiff on the question of liability. If it was the plaintiff's negligence which he could not avoid by the exercise of prudent driving, with knowledge of the situation, then the verdict should be for the defendant. If the jury find that the proximate cause of the occurrence was that of the defendant under the instructions given them, then their verdict should be for the plaintiff (R. 251). The jury was instructed that it did not follow that because there was an accident and some injuries sustained by the plaintiff that there can be a recovery (R. 255).

The defendant urges error because the District Court charged:

"If you find that he could have avoided the acci-

> dent, even though she contributed in part to it—I do not say she did; I say under that assumption then you must find for the plaintiff on the question of liability" (R. 251).

However, immediately following that the Court instructed the jury:

> "If it was her negligence which he could not avoid or by the exercise of prudent driving, with knowledge of the situation, why then your verdict would be for the defendant" (R. 251).

The instruction is to be read and understood in the light of the issues on the trial as stated under our Facts. Read not as an isolated phrase but as a whole, the Court said:

> "Now who was at fault? Does the plaintiff sustain her burden of proof? Does the defendant sustain its burden of proof in respect of contributory negligence? I think there has been testimony that not infrequently toll collectors stood on this ledge, and indeed the driver of the bus so admitted. If she needlessly placed herself in a dangerous condition that is to be taken into consideration, but if that dangerous position in which the defendant says she placed herself was known to the driver and he nevertheless sensing that danger proceeded, ignoring the hazardous position in which she was placed, then it is for you to determine whether he acted as a reasonable and prudent driver of that vehicle under all the circumstances prevailing even as described by the driver himself.
>
> "If you find that he could have avoided the accident, even though she contributed in part to it—I do not say she did; I say under that assumption

> then you must find for the plaintiff on the question of liability. If it was her negligence which he could not avoid or by the exercise of prudent driving, with knowledge of the situation, why then your verdict would be for the defendant.
>
> "So those are the considerations which you will doubtless give to the testimony in the case. If you find the proximate cause of this injury was that of the defendant under the instructions I have given you as to the existing law, then your verdict will be for the plaintiff" (R. 250-251).

We submit that the charge construed in its entirety correctly applied the law to the facts. It instructed the jury that the negligent act of the plaintiff, if any, must contribute proximately to the negligence of the defendant before it is a bar to her recovery.

The Circuit Court of Appeals in affirming the judgment said:

> "A charge must be interpreted as a whole, however, and not in individual parts. In substance the court charged that, if the plaintiff placed herself in a dangerous position and the bus driver knew of it, his subsequent negligent conduct, if any, might be the proximate cause of the accident and might necessitate a finding for the plaintiff. True, the New Jersey courts have in terms rejected the last-clear-chance doctrine. *Brennan* v. *Public Service Ry. Co.*, 106 N. J. L. 464, 148 A. 775. Nevertheless they have approved the formula that a plaintiff may recover, although negligent, if his negligence is not a proximate cause of the accident, but merely a condition of its occurrence. *State* (*Menger*) v. *Lauer*, 55 N. J. L. 205, 26 A. 180, 184. If there is a substantial difference between these two theories beyond the

verbal one shown by the formulas themselves, we believe the charge falls within the latter formula when viewed as a whole" (R. 280).

That such decision is in accordance with local law finds support in the very authorities cited by the petitioner on this application.

In *State (Menger)* v. *Lauer,* 55 N. J. L. 205, 26 A. 180, cited by the petitioner, the Court said:

> "If the faulty act of the plaintiff simply presents the condition under which the injury was received, and was not in a legal sense a contributory cause thereof, then the sole question will be whether, under the circumstances and in the situation in which the injury was received, it was due to the defendant's negligence."

In *New Jersey Express Co.* v. *Nichols,* 33 N. J. L. 434, 97 Am. Dec. 722, cited by the petitioner, it is stated:

> "In fact, it would be difficult to conceive of any case in which the conduct of the party injured might not, in some sense, be said to have contributed to his injuries. To conclude him from maintaining his action, his conduct must have been negligent, and his negligence must have contributed to the injury in such a way that if he had not been negligent, he would have received no injury from the negligence of the defendant."

In *Pennsylvania R. R. Co.* v. *Righter,* 42 N. J. L. 180, cited by the petitioner, it is said:

> "It is settled, as a part of this rule, that the negligent act of the plaintiff must contribute, proximately, to the injury, else the right of the

plaintiff to recover will not be defeated by such act.

"If, in spite of his negligent act, the injury would have occurred by means of the negligent conduct of the defendant, or if the injury is disconnected from his act by an independent cause, then there is no legal contribution to the injury."

In *Powers* v. *Standard Oil Co.,* 98 N. J. L. 730, 119 A. 273, cited by the petitioner, the violation of the traffic regulation was not a proximate cause of the occurrence and in *Mullen* v. *Rainear,* 45 N. J. L. 520, cited by the petitioner, carrying a heavy weight across a balcony knowing its weak condition constituted contributory negligence.

The defendant's brief speaks again and again, of the plaintiff's contributory negligence but does not refer to any facts in the record to support such charge. On page 4 of the brief, it states that plaintiff had been warned in a safety lecture not to stand on the curbing. That statement would be more correct if it stated that the plaintiff had been warned about the danger in standing on the curbing between the booth and a moving vehicle. It is one thing to warn a collector of the hazards involved, and it is quite another thing to say that such person should not be there. The Circuit Court of Appeals' opinion stated, "Plaintiff had been warned in a safety lecture not to go between the booth and a moving vehicle, but in fact it was often necessary for collectors to step out of their booths and upon the curb to collect the tolls" (R. 280).

A toll bridge is a public highway (Blashfield Cyclopedia of Automobile Law, Vol. 1, Chap. 3). The

plaintiff's job was to collect tolls. It was the defendant's duty to avoid contact with the plaintiff. Police officers or other workmen whose duties require them to be on public highways are not obliged to use the same degree of care that would be required of an ordinary pedestrian whose whole attention is directed to protecting his own safety. See Blashfield Cyclopedia of Automobile Law, Chap. 42, Sec. 1571; *Hughes* v. *English,* 9 N. J. Misc. 28, 152 A. 473; Huddy, 9th Ed., Sec. 106; *Lozio* v. *Perrone,* 111 N. J. L. 549, 168 A. 764.

The defendant asserts on page 4 of the brief that the plaintiff could have stepped off the bus, proceeded to her left and placed herself in front of the booth in one step. Had the driver given her the opportunity to complete the act of giving the scrip to Collector Morrow (the collector assigned to lane 4), and had the driver not started the bus prematurely, the plaintiff, to avoid being struck, would have gone to the west of the booth (referred to as "ahead" at R. 81), not to the left or the east as asserted by the defendant because that is never done (R. 83, 84). The driver was told to "hold it" when the plaintiff took the scrip from him (R. 26, 77). As the bus started, she again cried out "hold it" but the bus kept on going (R. 33). The driver admitted that he was aware of the danger and told the jury that he waited about fifteen seconds before starting the bus and that he made sure that she was in a safe place so that the bus would not strike her. Of course, the jury was free to reject such explanation. The plaintiff had the right to believe that the driver would not operate the bus in any way that would endanger her safety while she was performing her duties as a toll collector. The

driver in his rush to get away was so inattentive that he admits not having heard Collector Morrow shout or blow his police whistle (R. 125, 224) nor did he stop upon hearing the impact (R. 224), and he stopped only after a passenger in his bus hollered "the girl" (R. 225). Nor was the jury required to believe his statement that he was travelling only two or three miles an hour (R. 224). The driver from a starting position travelled fifty-eight feet before stopping (R. 105, 106).

The Circuit Court of Appeals holding that the questions of negligence and contributory negligence were for the jury cited *Byer* v. *H. R. Ritter Trucking Co.*, 131 N. J. L. 199, 35 A. 2d 633, which is strikingly similar, also involving a toll collector, injured while standing on a curbing. We believe that the instruction to the jury was in accordance with local law and that the defendant's contentions under Points I, III and IV are untenable.

In the Circuit Court the defendant urged that the charge was erroneous in that it failed to define negligence, proximate cause and contributory negligence. We believe that it is in answer to that contention that the Circuit Court said "we are less disposed to reverse for correction of a highly technical expression of the law, when the essential issues appear to us to have been put before the jury" (R. 280). The foregoing quotation did not refer to that portion of the charge urged in this Court to conflict with local law.

In any event, it has been stated that for the bulk of ordinary private litigation arising from negligence cases that come into this Court from diversity of citizenship, "the circuit courts of appeals are, and must be, courts of last resort, tribunals of final authority

as to the law of states which lie within their circuit". 48 Harvard Law Review 238, 269, in an article by Frankfurter (Justice) and Hart.

POINT II.

The decision in the case at bar does not conflict with the decisions of the Circuit Court of Appeals for the Third Circuit.

The defendant's contention that the decisions in *Houston* v. *Del. L. & W. R. Co.*, 274 Fed. 599, and *Lehigh Valley R. Co.* v. *Stevenson,* 17 F. 2d 748, decided by the Circuit Court of Appeals for the Third Circuit conflict with the decision in the case at bar, is equally untenable.

The *Houston* case was an action to recover damages for causing death of plaintiff's intestate who was a passenger on defendant's train. The deceased was standing on the steps of a car as the train was nearing a station when in some manner he jumped or fell off, before the train reached the station, resulting in his death. A trainman who saw "an object go by" pulled the whistle cord twice. Defendant's witnesses claimed the train stopped within sixty feet after such signal while the plaintiff claimed the train went much farther. A New Jersey statute barred recovery if a person jumped off a moving train and charged such person with contributory negligence. The plaintiff, in appealing from a jury verdict rendered for the defendant, complained error because of the Trial Court's refusal to charge two requests which, in substance, invoked the last-clear-chance doctrine. The Circuit Court of Appeals in affirming the judgment

said that the Trial Court had substantially covered the points of the requests. Furthermore, the Court said at page 603:

> "The evidence does not show such gross negligence on the part of the defendant, if it really shows any whatever, as to imply a disregard of consequences and a willingness to inflict injury. At most, this was a case of concurrent negligence. We doubt that, under the evidence in this case, the plaintiff was entitled to have the court charge the benefit of the last-clear-chance."

The *Lehigh* case was an action for personal injuries. The plaintiff ran and succeeded in catching the defendant's train and in getting on the rear step when, delaying his ascent to the platform to regain his breath, was swept off by an upstanding girder. The Trial Court submitted the case to the jury on the doctrine of the last-clear-chance because one of defendant's witnesses, Barker, a trainman, testified that several seconds elapsed between his discovery of the plaintiff at the car door, and the instant of the accident and that the jury might find that Barker within that period could have done something to prevent the occurrence. The Court reversed a judgment for the plaintiff and ordered a new trial saying at page 750:

> "The time when Barker first sighted the plaintiff until he was hurt by the girder is variously estimated to have been from two to six seconds. The jury, we think, were left to conjecture what steps Barker in the emergency of the movement, might and should have taken to save the plaintiff after discovering the position of great peril into which he had put himself. 29 Cyc. 434. More than that, they were left to find from the evidence, as

an essential element in the last-clear-chance doctrine, that Barker's action or lack of action amounted to gross negligence or negligence so gross, under the New Jersey rule, as to imply on his part a disregard of consequences or a willingness to inflict injury. We are unable to find anything in Barker's testimony that sustains such a finding. Nor from Barker's testimony can we discover anything to sustain a finding that the plaintiff's act of holding on to the car and running with it was not concurrent with the actions of Barker."

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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February 15th, 1947.